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No. 08-5721

ORIGINAL

In The
Supreme Court of the United States

STEVEN SPEARS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. May a district court categorically reject the sentencing guideline for crack cocaine as too harsh?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Steven Spears respectfully prays that a writ of certiorari issue pursuant to 28 U.S.C. § 1254(1) to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on June 23, 2008, a split en banc opinion reversing the judgment of the district court.

OPINIONS BELOW

The opinion of the court of appeals is currently reported at ___F.3d___, 2008 WL 2485329 and is reproduced at App. 1.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the United States Constitution and 18 U.S.C. § 3553(a), each of which is reproduced at App. 3.

STATEMENT OF THE CASE

This case presents an unusual procedural history, and would come before this Court for a second time. The case was initially heard on appeal in 2006 by a panel of the Eighth Circuit consisting of Judges Bye, Lay, and Riley. After argument, it appears that Judges Bye and Lay were in favor of affirming the district court's sentence. However, no panel opinion was issued; rather an *en banc* opinion written by Judge Riley (the apparent dissenter on the original panel) was issued, over the dissent of Judges Lay and Bye, reversing the district court and remanding for resentencing. Briefing and argument *en banc* were not conducted. Mr. Spears' subsequent petition for certiorari was granted and the Eighth Circuit's decision was vacated and remanded after this Court's ruling in *Kimbrough v. United States*, 128 S. Ct. 558 (2007). On remand, the *en banc* Eighth Circuit again reversed and remanded for resentencing on a 6-5 vote, holding that a district court may not categorically reject the sentencing guideline for crack cocaine as too harsh. Mr. Spears now seeks certiorari review of that decision.

The issue in this case arose at sentencing. On September 20, 2005, a jury convicted Steven Spears of conspiracy to distribute 1,792 grams of crack cocaine and 500 grams of powder cocaine. At sentencing, the district court properly

calculated the sentencing guidelines range. (Sentencing Tr. at p. 22) Based on the drug quantities involved, the court found that the total offense level was 38. Initially the court found that Spears' criminal history category was a III. After considering Spears' youth, frequency of prior criminal conduct, and the need to avoid disparities between defendants with similar records, the court determined that his prior criminal history was underrepresented and *increased* his criminal history category to IV. (*Id.* at pp. 20-22) The consequent guidelines sentencing range was 324-405 months imprisonment.

After properly calculating the Guidelines range, the district court considered a variance based on the 100:1 crack/powder quantity ratio inherent in the guidelines. In a nutshell, the 100:1 quantity ratio was reflected in two places at the time of sentencing. First, it was built into the statutory mandatory minimums at 21 U.S.C § 841, which are and were mandatory. Under that section offenses involving 50 grams of crack cocaine or 5 kilograms (5,000 grams) of powder cocaine both triggered a 10 year mandatory minimum sentence. Likewise, offenses involving 5 grams of crack cocaine or 500 grams of powder cocaine both trigger a 5 year mandatory minimum sentence. Where there is a conflict between the Guidelines and the statutory mandatory minimum, the mandatory minimums prevail and the sentence length may not be shorter than

prescribed by statute. The district court adhered to the statutory minimum sentence in this case. Additionally, the 100:1 quantity ratio was also present in section D1.1 of the sentencing guidelines, which are now advisory. The district court below varied from the advisory Guidelines and its use of the 100:1 ratio, while honoring the statutory mandatory minimum sentence of 240 months.

The district court, after considering all of the 18 U.S.C. § 3553(a) factors, found that the guidelines sentence, based on the 100:1 ratio, was greater than necessary and adopted the rationale of *United States v. Perry*, 389 F. Supp. 2d 278 (D.R.I. 2005). In *Perry*, a district court varied from the Guidelines sentence based on its assessment that the 100:1 crack/powder ratio was not justified in light of § 3553(a)(2). *Id.* at 303. In particular, the *Perry* court opined that the guidelines sentence was greater than necessary to reflect the seriousness of the offense and deter criminal conduct. *Id.* That opinion was based, in large part, on the Sentencing Commission's own reports on the issue. Indeed, the commission found that crack cocaine was not as harmful or dangerous as first thought. After a thorough discussion of crack cocaine in light of § 3553(a)(2), the *Perry* court varied downward based on the 20:1 crack/powder quantity ratio suggested by a 2002 Sentencing Commission report.

The district court in this case also varied downward based on the 20:1 crack/powder ratio. All parties agreed that the downward variance based on the 20:1 ratio resulted in an offense level of 34 providing a Guidelines sentencing range of 210 to 262 months. (Sentencing Tr. at p. 23) The district court recognized that the statutory mandatory minimum in the case was 240 months. (*Id.*) Acknowledging that any further variance downward would be moot because the sentencing range was already lower than the mandatory minimum, the court reserved the right to rule on any other variance in favor of the defendant if and when the case was successfully appealed by the government. (*Id.* at pp. 28-29) The court then sentenced Spears to 240 months in prison.

The government appealed the sentence, and Spears appealed the conviction, to the Eighth Circuit Court of Appeals. The case was argued and submitted to a three judge panel consisting of Judges Bye, Lay, and Riley. The court of appeals, surprisingly, issued a split *en banc* opinion without argument, further briefing, or a panel opinion having been issued. *United States v. Spears*, 469 F.3d 1166 (8th Cir. 2006) (en banc). (App. 2) The en banc majority was authored by Judge Riley, who also sat with the original panel, apparently in the minority (given the dissent of Judges Lay and Bye to the *en banc* opinion itself). The court held that "neither *United States v. Booker*, 543 U.S. 220, 264 (2005)

nor § 3553(a) authorizes district courts to reject the 100:1 ratio and use a different ratio in sentencing crack cocaine offenses." *Spears*, 469 F.3d at 1176. (App. 2) The court of appeals affirmed the conviction but reversed the sentence and remanded the case to the district court for resentencing in the split *en banc* decision issued on December 5, 2006.

This Court granted Mr. Spears' petition for certiorari to the Eighth Circuit after it decided *Kimbrough*, vacating the prior Eighth Circuit opinion and remanding for reconsideration.

Taking up the issue for the second time, the Eighth Circuit again rejected the trial court's sentence. The Circuit was split, 6-5, on this issue, which was articulated through three opinions. One opinion, for five judges and written by Judge Riley, asserted that the judge below had improperly sentenced Spears, and that a district court may not "categorically reject the ratio set forth in the guidelines." *United States v. Spears*, ___ F.3d ___, 2008 WL 2485329 (8th Cir. June 23, 2008) (en banc) (*Spears II*) . A second group of five judges disagreed in an opinion written by Judge Colloton. The deciding vote came in a concurrence by Judge Murphy, a former chairperson of the United States Sentencing Commission and an author of the 2002 Sentencing Commission report cited by this Court in *Kimbrough*. Judge Murphy agreed with the Riley opinion's

ban on "categorical rejection" of a guideline, asserting that "The sentencing focus must be on the 'particular defendant' rather than on a whole category of cases." *Spears II*, 2008 WL at *3.

REASONS FOR GRANTING THE PETITION

This case both creates a split in the Circuits and clearly divided the Eighth Circuit itself. At its heart, the problem is a perceived ambiguity in *Kimbrough* — whether or not a sentencing court may categorically reject the sentencing guideline for crack cocaine simply because that court views that guideline as too harsh (or too lenient). Resolution of this question is necessary to provide proper guidance to sentencing courts.

I. The Eighth Circuit's Rule Prohibiting Categorical Rejection of a Sentencing Guideline Presents Important Questions of Constitutional and Federal Statutory Interpretation That This Court Should Decide.

A. The Eighth Circuit has challenged the key holding in Kimbrough that the guidelines' crack-powder ratios may be rejected even in "mine-run" cases.

Though Mr. Spears' case was remanded for further consideration in light of *Kimbrough*, the Eighth Circuit did not give Mr. Spears the benefit of *Kimbrough*'s holding. Instead, the Circuit Court held that the district judge erred by "categorically" rejecting the 100:1 ratio then existing within the sentencing guidelines by applying a different ratio.

This holding ignores the core of this Court's decision in *Kimbrough* — that a court may reject the crack guidelines even in ordinary cases. This Court was very specific in recognizing that the crack guideline at issue here was deeply flawed. As Justice Ginsburg described them in *Kimbrough*, the crack guideline was established in a moment when the Sentencing Commission "abandoned its characteristic institutional role" and acted without considering empirical data or reference to national experience. 128 S. Ct. at 575. Thus, the crack guideline itself could be seen as inappropriate by a district court not only in exceptional cases turning on individualized circumstances, but in average cases which lack such individualized facts:

> Given all of this, it would not be an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence "greater than necessary" to achieve § 3553(a)'s purposes, even in a mine-run case. *Id.*

In forbidding sentencing judges from "categorically" rejecting a guideline, the Eighth Circuit runs afoul of this central tenet of *Kimbrough*. This Court, after all, has held that a district court may reject the guidelines even in the absence of mitigating individualized circumstances. What is that, if not a categorical rejection of the guideline at issue on policy grounds? When a sentencing judge sets aside a guideline as simply being too harsh or lenient in a

"mine-run" case, she is clearly rejecting that guideline categorically – it is an unconditional and explicit rejection of that guideline as wrong on its face, regardless of circumstances unique to that case.[1] It is logically impossible to at once recognize that a sentencing judge may reject a sentence solely on the policy shortcomings of a guideline, and then prohibit such a rejection as "categorical." Because it is that *category* of sentences suggested by the guidelines that is necessarily being rejected (even in the absence of individualized mitigating circumstances), this lawful employment of judicial discretion is by definition categorical.

Nothing in *Kimbrough* discourages a court from reasonably rejecting an entire category of guideline cases because that guideline is simply too tough or too soft. This is not simply the interpretation that Mr. Spears gives the *Kimbrough* opinion; it is also the reading given that opinion by Justice Scalia in his *Kimbrough* concurrence.

In that concurrence, Justice Scalia notes that Justice Ginsburg's majority opinion did mention (in dicta) the possibility of closer scrutiny on appeal in non-crack cases where a judge has categorically rejected a guideline. Having joined that majority opinion, he wrote simply to clarify that this statement should not be

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1 The dictionary definition of "categorical" is "unconditional, absolute; positive, explicit." WEBSTER'S UNIVERSAL ENGLISH DICTIONARY 50 (2005).

taken as "an unannounced abandonment" of this Court's statements in several previous cases that district courts must be "free... to reject (after due consideration) the advice of the Guidelines." 128 S. Ct. at 576-577 (Scalia dissent). In context, this clarification makes clear that (at least to Justice Scalia) the *Kimbrough* majority opinion should not be read to disallow a broad rejection of a sentencing guideline on policy grounds alone—exactly the reading given the *Kimbrough* opinion by the Eighth Circuit.

Kimbrough established that a district court may reject the crack guideline on policy grounds alone. Whether that ability is characterized as applying in a "mine-run case" or "categorically" makes no difference -- *Kimbrough* addressed and answered *this* question, in *this* context.

B. It was not error for the District Court to employ a reasonable alternative to the 100-1 ratio as a means of determining what sentence would be sufficient but not greater than necessary.

Honesty and transparency in sentencing are goals lauded by this Court in both *Rita v. United States*, ___ U.S.___, 127 S. Ct. 2456, 2469 (2007), and *Booker*. As the dissent in *Spears II* convincingly argued, the principles of honesty and transparency are furthered by the district court's approach of categorical rejection of the 100-1 ratio and embrace of a different, reasonable ratio. The district court below followed proper procedure and both considered

the 18 U.S.C. § 3553(a) factors in whole and calculated the proper guideline range, and in fact even allowed an upward departure for criminal history. The error alleged by the Eighth Circuit was that the sentencing judge chose a well-recommended, honest, and transparent alternative to the guideline it was rejecting. The Eighth Circuit's rejection of this approach warrants review.

In *Kimbrough*, this Court did, in fact, speak approvingly of the district court's procedure in part because that court "did not purport to establish a ratio of its own." 128 S. Ct. at 575. However, the *Kimbrough* opinion also spoke approvingly of a district court that crafts a sentence "in line with § 3553(a)'s overarching instruction to 'impose a sentence sufficient, but not greater than necess. .y' to accomplish the sentencing goals advanced in § 3553(a)(2)." Id. Because the guideline at issue in both *Kimbrough* and this case expressed the relationship between crack and powder cocaine in terms of ratios, it is natural that sentencing courts will use alternative ratios as a means of determining what sentence will be "sufficient, but not greater than necessary."

Such an approach is most consistent with the type of sentencing process this Court has sought in *Booker* and its progeny. When a judge rejects a guideline on policy grounds (as *Kimbrough* allows), it best serves the causes of honesty and transparency if that judge clearly articulates the alternative

calculation that is being used. The alternative ratio used in this case, 20-1, made explicit the precise degree to which the sentencing judge was deviating from the relevant guideline. Further, that ratio was chosen for its reasonableness—it was that ratio which was recommended by the United States Sentencing Commission in its 2002 Report to Congress on Cocaine Sentencing. It makes no sense to bar district courts from taking the advice laid out in such a report. Such a bar, oddly, excises mention or use of the recommended ratio *because* it is transparent and honestly directive, qualities which should be encouraged in sentencing.

In a case where a sentencing court's only basis for a variance is a policy disagreement with a guideline, the Eighth Circuit appears to prefer that a course which encourages a sentencing judge to either create an individualized factor or otherwise obscure her reasoning in rejecting a guideline on policy grounds. The dissent below points out the quandary a district judge confronts when rejecting a ratio-based guideline (such as § 2D1.1) on policy grounds alone. If that judge is not allowed to even consider basing his sentence on a different ratio, he is deprived of the chance to use an important analytical tool — the very tool employed by the sentencing commission itself in its own analysis of the crack guidelines. On the other hand, if the Eighth Circuit is instead saying that a judge is allowed to consider a different ratio but may not reveal what it is in

announcing a sentence, then the Eighth Circuit is simply requiring subterfuge. It is error for the Eighth Circuit to simultaneously acknowledge that the guidelines are only advisory, and then bar district courts from employing the analytical tool that the sentencing commission itself used to critique the guideline.

C. If courts are not allowed to categorically reject the sentencing guideline for crack, the federal sentencing scheme violates the Sixth Amendment.

As Justice Scalia described in his *Kimbrough* concurrence, the majority opinion in that case should not be read as an "abandonment" of the principle, articulated in several prior cases, which allows a district court to reject a guideline only because of its policy—that is, because it is too harsh or too lenient when viewed within the context of 18 U.S.C. § 3553(a) as a whole, including that statute's demand that a sentence properly account for the "seriousness of the offense." 128 S. Ct. at 576-577. One example Justice Scalia cites is the direction given in *Rita*, which allows for variance from a guideline "perhaps because the Guidelines sentence itself fails properly to reflect § 3553(a) considerations, or perhaps because the case warrants a different sentence regardless." 127 S. Ct. at 2465. A variance based on a finding that a guideline itself "fails properly to reflect § 3553(a) considerations" — that is, because the guideline does not properly reflect the seriousness of the offense and is either too

harsh or too lenient -- is fairly described as "categorical," in that it represents a rejection of that guideline even in the absence of mitigating individualized circumstances.

Now the Eighth Circuit has barred such categorical rejections. The result of this rule will be that in cases where there are no mitigating individual circumstances the judge will be faced with a mandatory guideline because she cannot "categorically" reject the relevant guideline, and has no other options. This violates the Sixth Amendment in exactly the way this Court described in *Booker*: Sentencing would take place within a scheme in which judges raise sentences on facts they find, without the option of setting aside the guideline itself as merely advisory. Because this case raises this important constitutional question, it merits further review by this Court.

D. The question presented remains vital despite the recent amendment of sentencing guideline 2D1.1.

The sentencing guidelines were amended on November 1, 2007, after Spears (and Kimbrough), were sentenced. This amendment reduced the base offense level for crack by two offense levels across the board, resulting in a crack/powder ratio that varies depending on the weight of the drugs at issue.

Though the 100:1 ratio at issue here is no longer a part of the guidelines themselves, the issue presented here will live on because the amended guideline

still maintains a discrepancy between powder and crack cocaine which may be categorically rejected by sentencing judges who view it as too harsh. As this Court noted in *Kimbrough* itself, this "modest" amendment was seen by the sentencing commission as only a partial remedy for the unreasonableness of the crack guidelines. 128 S. Ct. at 569. Because the gap between powder and crack cocaine remains wide, the issue in this case must be resolved in order to provide direction to sentencing judges who now are unsure if an explicit rejection of the crack guideline on policy grounds might be reversed as "categorical."

II. The Eighth Circuit's Rule Prohibiting the Categorical Rejection of a Sentencing Guideline Conflicts with Several Circuits' Interpretation of Kimbrough.

The Eighth Circuit's holding that a district court may not "categorically reject" a particular Sentencing Guideline based on a "policy disagreement" conflicts with circuit courts around the country. Moreover, the Eighth Circuit's requirement that a district court must consider the "individualized, case specific facts" splits with the post-*Kimbrough* decisions of many circuits. Out of hundreds of published decisions, only the Third Circuit even arguably agrees with the reasoning espoused in *Spears II*. The Eighth Circuit's decision should be reversed to bring conformity to the nation's post-*Kimbrough* sentencing law.

In a striking example of the current conflict, the First Circuit recently held "that district judges may deviate from the guidelines even on the bases of *categorical policy disagreements*." *United States v. Boardman*, 528 F.3d 86, 87 (1st Cir. 2008) (emphasis added). In *Boardman*, the defendant's argument on appeal was *not* that his individual circumstances warranted a variance, but rather, that the district judge could vary based on a policy disagreement with the guidelines. *Id.* Because the district judge did not know he had the discretion to vary based on the "Commission's policy judgment," the court went on to vacate the defendant's sentence. *Id.*

Similarly, in *United States v. Ford*, 271 Fed. Appx. 532 (7th Cir. 2008), a defendant argued that he deserved a lighter sentence based on the crack/powder disparity and not based on individualized circumstances. The district court refused to vary, believing that it did not have the discretion to do so based on a policy disagreement with the guidelines. *Id.* at 533. The Seventh Circuit reversed, noting that "after *Kimbrough*, even in a *mine-run case*, district courts may impose lower sentences based on a determination that the ratio produces a sentence greater than necessary for a particular defendant." *Id.* at 534 (emphasis added). This disagreement may be based solely on a policy disagreement with -- or categorical rejection of -- the guidelines. *See id.*

Several other circuits' holdings have disagreed with the Eighth Circuit's post-*Kimbrough* limitation on sentencing discretion. *United States v. McGowan*, 2008 WL 1953543, (11th Cir. 2008) (noting that it is not an abuse of discretion to "reduce [a defendant's] sentence based on a policy disagreement with the crack/powder disparity"); *United States v. Banks*, 2008 WL 2824888, *2 (4th Cir. 2008) (reversing a sentence in light of *Kimbrough's* command that it is not an abuse of discretion to vary based on the crack/powder ratio in a "mine-run" case); *see also United States v. Pickett*, 475 F.3d 1347, (D.C. Cir. 2007) ("a sentencing court errs when it believes that it has no discretion to consider the crack/powder differential incorporated in the Guidelines") (quotations omitted).

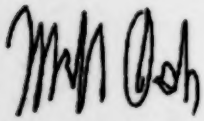
Only the Third Circuit arguably agrees with the Eighth Circuit's reasoning in *Spears II*. In *United States v. Gunter*, 527 F.3d 282 (3d Cir. 2008), a defendant appealed a crack sentence. The district court refused to vary based on its observation that it could not "second guess the Sentencing Commission or the Congress" and reduce the sentence based on the crack/powder disparity. *Id.* at 287. The court of appeals held that a district court must consider "individualized circumstances" and any "approach that categorically rejects the crack powder disparity without an individualized assessment" is forbidden, affirming the sentence. *Id.* at 286.

Thus, like the Eighth Circuit's decision in *Spears II*, the Third Circuit's decision is in direct conflict with the circuit courts that hold that a district court may categorically reject a guideline based on a policy disagreement. Both *Spears II* and *Gunter* are incorrect under *Kimbrough* and both generate inconsistency in sentences for similar criminals committing similar crimes. This inconsistency is not based on permissible disparity between various district courts but, instead, is based on an erroneous legal limitation on sentencing discretion that applies in some parts of the country and does not apply in others. This Court should resolve the conflict.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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